DEPARTMENT OF JUSTICE

Antitrust Enforcement and Agriculture

Address by

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I appreciate the opportunity to discuss the role that the antitrust laws play in the agricultural marketplace. In the last few years, agricultural producers and others have expressed concern about competitive conditions in the agricultural marketplace, about the impact on farmers of particular mergers and acquisitions, and about levels of concentration in agriculture generally. We know that the agricultural marketplace is undergoing significant changes, including major advances in technology and productivity, an increasingly global marketplace, changes in business relationships between producers and packers/processors, and in many sectors, a trend toward consolidation. I know that the Organization for Competitive Markets is particularly interested in enforcement activity at the Antitrust Division that affects the agricultural marketplace, and it is to that subject that I turn.

I. Introduction

We at the Antitrust Division have heard concerns expressed by various groups about increasing concentration in various agricultural sectors. By any measure, the Division has been spending a significant amount of time, energy, and resources on agricultural issues in the recent past. Sometimes our work results in enforcement actions, a few of which I will describe shortly. In recent years, Antitrust Division officials have traveled to the Midwest to meet personally with producer groups, and have met and spoken with individual producers and farm organizations and testified at hearings in Washington and in the field to learn producers' concerns directly and to improve everyone's understanding of how the antitrust laws operate and how the Division works to protect competition under them. Since taking the reins of the Division just last month as Assistant Attorney General, Charles James has indicated he intends to continue the Division's focus on this sector of the economy.

There are three basic kinds of violations of the antitrust laws. First, the antitrust laws

prohibit conspiracies to deny market access or otherwise suppress competition. Thus, it is a violation of section 1 of the Sherman Act for separate firms to agree among themselves not to compete with each other, but instead to join forces against their consumers or against their suppliers. Second, the antitrust laws also prohibit the use of predatory and/or exclusionary conduct to acquire or hold onto a monopoly in a market; that is, it is a violation of section 2 of the Sherman Act for a firm to monopolize or attempt to monopolize a market. Third, the antitrust laws prohibit mergers that are likely to substantially lessen competition in a market; more specifically, it is a violation of section 7 of the Clayton Act for a firm to merge with another firm or acquire its assets if to do so would be likely to substantially lessen competition in any market or tend to create a monopoly. The antitrust laws are based on the principle that competitive market forces should play the primary role in determining the structure of our economy. Our job is to stop the specific kinds of private-sector conduct I just mentioned from interfering with those market forces. I would now like to describe each of these types of violations in a little more detail in the context of specific enforcement actions affecting the agricultural marketplace as illustrations.

II. Price Fixing Prosecutions in Agriculture

A. Lysine. Beginning in 1996, the Antitrust Division prosecuted Archer Daniels Midland and others for participating in an international cartel organized to suppress competition for lysine, an important livestock and poultry feed additive. The cartel had inflated the price of this important agricultural input by tens of millions of dollars during the course of the conspiracy. ADM pled guilty and was fined $100 million -- at the time the largest criminal antitrust fine in history. Two Japanese and two Korean firms also were prosecuted for their participation in the worldwide lysine cartel and were assessed multi-million dollar fines. In addition, three former

ADM executives were convicted for their personal roles in the cartel; two of them were sentenced to serve 36 and 33 months in prison, respectively, and fined $350,000 apiece for their involvement, and the other executive had 20 months added to a prison sentence he was already serving for another offense.

B. Vitamins. In 1999, the Antitrust Division prosecuted the Swiss pharmaceutical giant, F. Hoffmann-La Roche Ltd., and a German firm, BASF Aktiengesellschaft, for their roles in a decade-long worldwide conspiracy to fix prices and allocate sales volumes for vitamins used as food and animal feed additives and nutritional supplements. The vitamin conspiracy affected billions of dollars of U.S. commerce. Hoffmann-La Roche and BASF pled guilty and were fined $500 million and $225 million, respectively. These are the largest and second-largest antitrust fines in history -- in fact, the $500 million fine is the largest criminal fine ever imposed in any Justice Department proceeding under any statute. Three former Hoffmann-La Roche executives from Switzerland and three former BASF executives, two from Germany and one from Switzerland, agreed to submit to U.S. jurisdiction, to plead guilty, to serve time in a U.S. prison, and to pay substantial fines for their role in the vitamin cartel. These prosecutions were part of an ongoing investigation of the worldwide vitamin industry, in which there have been 24 corporate and individual prosecutions to date, including convictions against Swiss, German, Canadian, Japanese, and U.S. firms, and convictions of 11 American and foreign executives who are serving or have served time in federal prison and another executive who received two years'

probation; another executive agreed to plead guilty and is awaiting sentencing.[1]

C. Monochloroacetic Acid & Sodium Chloroacetate (collectively "MCAA")

In the first week after Mr. James was sworn in as Assistant Attorney General in charge of the Antitrust Division, we filed a felony information against a Dutch chemical company, Akzo Nobel Chemicals BV, and an Akzo Nobel executive of Swedish citizenry, charging them with participation in an international price fixing and market allocation scheme during the last half of the 1990s involving these chemicals (monochloroacetic acid and sodium chloroacetate--collectively MCAA--of which the United States consumes $50 million annually), which among other things, are used to produce herbicides. The company agreed to plead guilty and pay a $12 million criminal fine, and Erik Anders Broström, the individual company executive, agreed to plead guilty and to serve a three month jail sentence in the United States. This is the first criminal case in an ongoing probe of the MCAA industry.

On a smaller scale, we also successfully prosecuted two cattle buyers in Nebraska a few years ago for bid-rigging in connection with procurement of cattle for a meat packer, after an investigation conducted with valuable assistance from the Department of Agriculture, which was investigating some of the same conduct under the Packers and Stockyards Act.

Before I leave collusion, I should mention an important exception to the prohibition against agreements to restrain competition, found in the Capper-Volstead Act. This law allows producers of agricultural commodities to form processing and marketing cooperatives – in effect

[1] The Division's Corporate Amnesty Program, which has been largely responsible for uncovering the majority of the large international cartels we have recently prosecuted, offers companies and their executives an alternative to such sentences. For example, the vitamin cartel was cracked by cooperation provided by French-based Rhône-Poulenc SA. (The Division ordinarily treats the identity of amnesty applicants as confidential, but in this instance, the company issued a press release announcing its acceptance into the Amnesty Program.) For further details on the Amnesty Program, see our website at http://www.usdoj.gov/atr/public/guidelines/guidelin.htm.

to engage in joint selling at a price agreed to by the producer members of the co-op – subject to certain limitations enforced in the first instance by USDA.

III. Merger Enforcement in Agriculture

On a day-to-day basis, the most frequent context in which we consider concentration levels involves our analysis of mergers and acquisitions (referred to collectively hereafter as "mergers").

In the last two and a half years, the Antitrust Division has challenged four mergers that would have harmed competition in agricultural markets:

- the proposed acquisition by Monsanto of DeKalb Genetics Corporation, which would have significantly reduced competition in corn seed biotechnology innovation to the detriment of farmers;
- the proposed acquisition by Cargill of Continental's grain business, which would have significantly reduced competition in the purchase of grain and soybeans from farmers in various local and regional markets;
- the proposed acquisition by New Holland of Case, which would have significantly reduced competition in the sale of tractors and hay tools to farmers; and
- the proposed acquisition by Monsanto of Delta & Pine Land, which would have significantly reduced competition in cotton seed biotechnology to the detriment of farmers.

A. Merger Enforcement Standards

The antitrust laws prohibit the acquisition of stock or assets if the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. This enables us to arrest anticompetitive mergers in their incipiency, to forestall harm that would otherwise ensue but be difficult to undo after the parties have consummated a merger. Thus, merger enforcement standards are forward-looking and, while the Antitrust Division often considers historic performance in an industry, the primary focus is to determine the likely

competitive effects of a proposed merger in the future. The remedy we seek for a merger that violates the Clayton Act is to sue to stop the merger, or to insist that it be modified to remove the cause for antitrust concern.

B. Conducting Merger Investigations

Merger reviews require a careful analysis of the markets involved. The Antitrust Division analyzes mergers pursuant to Horizontal Merger Guidelines developed jointly by the Department of Justice and the Federal Trade Commission, with whom we share merger enforcement responsibility, except for certain industries in which the FTC's jurisdiction is limited by statute.[2] The analysis is aimed at determining whether the merger is likely to create or increase market power, or to facilitate the exercise of market power, in any market. The Guidelines define market power to a *seller* as "the ability profitably to maintain prices above competitive levels for a significant period of time." Market power also includes the ability of a single *buyer* or a coordinating group of buyers "to depress the price paid for a product to a level that is below the competitive price and thereby depress output." Merger Guidelines § 0.1.

In order to make that assessment, we usually determine the scope of the product markets and geographic markets that would be affected by the merger. This is an important first step in our analysis – until we know the size and shape of the market, we cannot know how big any firm's market share is, for example. The scope of a market is generally defined by the smallest geographic area in which a hypothetical firm, assuming it faced no competition for its product in

[2] The Antitrust Division and the FTC use a clearance process to work out which agency will review a particular merger. The primary determinant is agency expertise about the product or service at issue, so that a merger will usually be reviewed by whichever of the two agencies is most knowledgeable about the relevant product or service. As a result of the clearance process with the FTC, the Antitrust Division has investigated the preponderance of mergers affecting agriculture, with a prominent exception being grocery store mergers, which are usually reviewed by the FTC.

that area, could make a small but significant change in price stick. Usually, we are looking at that firm as a seller, and determining the smallest area within which the firm's customers would be unable to thwart the firm's inflated pricing by going outside that area for their buying needs. But, as our Merger Guidelines expressly note, we also look at the firm as a buyer, and determine the smallest area in which sellers to the firm would be unable to thwart the firm's depressed prices by selling to others outside that area – that is, because it would be economically impractical to travel or ship outside that area.[3]

A decision as to the dimensions of this area can sometimes be reached by examining recent buying and selling patterns in the marketplace. But the decision can also depend on a variety of other, more subtle factors, because the ultimate question is not how far the buyers and sellers have traveled or shipped in the past, but how far they could or would travel or ship in response to anticompetitive price changes.

Once we have defined the market, we turn to the question of market concentration and how it would be affected by the merger. There is no automatic threshold of market concentration that will always result in a determination that a merger would violate section 7 of the Clayton Act.

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[3] Market power by a buyer is addressed by the Merger Guidelines under the same analytical framework as a seller's market power that may result from a merger:

> Market power also encompasses the ability of a single buyer (a "monopsonist"), a coordinating group of buyers, or a single buyer, not a monopsonist, to depress the price paid for a product to a level that is below the competitive price and thereby depress output. The exercise of market power by buyers ("monopsony power") has adverse effects comparable to those associated with the exercise of market power by sellers. In order to assess potential monopsony concerns, the Agency will apply an analytical framework analogous to the framework of these Guidelines.

Merger Guidelines § 0.1.

Other factors also play an important role in analyzing the impact of the merger – such as other structural features of the market that make anticompetitive effects more likely or less likely; and the ease or difficulty of entry into the marketplace by new competitors who could neutralize any anticompetitive potential.

C. Recent Agriculture Merger Actions

1. **Monsanto/DeKalb.** In 1998, the Antitrust Division investigated Monsanto's proposed acquisition of DeKalb Genetics Corporation. Both companies were leaders in corn seed biotechnology and owned patents that gave them control over important technology. We expressed strong concerns about how the merger would affect competition for seed and biotechnology innovation. To satisfy our concerns, Monsanto spun off to an independent research facility its claims to agrobacterium-mediated transformation technology, a recently developed technology used to introduce new traits into corn seed such as insect resistance. Monsanto also entered into binding commitments to license its Holden's corn germplasm to over 150 seed companies that currently buy it from Monsanto, so that they can use it to create their own corn hybrids.

2. **Cargill/Continental.** In 1999, the Antitrust Division investigated the proposed purchase by Cargill of Continental's grain business, which resulted in a suit to challenge the merger as originally proposed. The merger affected a number of markets. The parties were buyers of grain and soybeans in various local and regional domestic markets and also sellers of grain and soybeans in the United States and abroad. We carefully looked at all of the potentially affected markets and ultimately concluded that the proposed merger could have depressed prices received by farmers for grain and soybeans in certain regions of the country; we were also concerned that the transaction could have had anticompetitive effects with respect to certain

futures markets.

Our written response to the public comments we received in this case gives a good picture of the thoroughness with which the Division investigated all the potentially affected markets and sought relief wherever we concluded that the transaction was competitively problematic. A team of about 20 attorneys, economists and paralegals reviewed over 400 boxes of documents furnished by the parties in response to formal requests we made; deposed the parties' executives; consulted with officials of USDA, CFTC and state attorney general offices; and interviewed over 100 farmers, farm organization officials, agricultural economists, grain company executives, and other individuals with knowledge of the industry and competitive conditions.

To resolve our competitive concerns, Cargill and Continental agreed to divest a number of facilities throughout the Midwest and in the West, as well as in the Texas Gulf. The nature of the relief demonstrates the individualized attention that we paid to local and regional markets. We insisted on divestitures in three different geographic markets where both Cargill and Continental operated competing port elevators: (1) Seattle, where their elevators competed to purchase corn and soybeans from farmers in portions of Minnesota, North Dakota, and South Dakota; (2) Stockton, California, where the elevators competed to purchase wheat and corn from farmers in central California; and (3) Beaumont, Texas, where the elevators competed to purchase soybeans and wheat from farmers in east Texas and western Louisiana.

We also required divestitures of river elevators on the Mississippi River in East Dubuque, Illinois, and Caruthersville, Missouri, and along the Illinois River between Morris and Chicago, where the merger would have otherwise harmed competition for the purchase of grain and soybeans from farmers in those areas. The Illinois River divestitures (and an additional required divestiture of a port elevator in Chicago) also prevented the merger from anticompetitively

concentrating ownership of delivery points that have been authorized by the Chicago Board of Trade for settlement of corn and soybean futures contracts.

In addition, we required divestiture of a rail terminal in Troy, Ohio, and we prohibited Cargill from acquiring the rail terminal facility in Salina, Kansas, that had formerly been operated by Continental, and from acquiring the river elevator in Birds Point, Missouri, in which Continental until recently had held a minority interest, in order to protect competition for the purchase of grain and soybeans in those areas.

This relief was designed to ensure that farmers in the affected markets would continue to have alternative buyers to whom to sell their grain and soybeans. Pursuant to the Tunney Act, there was opportunity for public comment on the proposed relief. In February 2000, the Department filed its response to public comments, providing a window on the investigation we conducted as well as answering numerous comments on our proposed decree.[4] Finding that entry of our proposed consent decree was in the public interest, the court in June 2000 approved the final judgment. The case demonstrates that the Antitrust Division will challenge mergers that threaten competitive harm to sellers of goods and services.

3. **Case/New Holland.** In November 1999, the Antitrust Division filed a complaint challenging the proposed merger between New Holland and Case Corporation because of our concern that the transaction would lead to higher prices for certain types of machinery purchased by farmers. The parties manufactured and sold four-wheel and large two-wheel drive

[4] The responses were published in the Federal Register at 65 Fed. Reg. 15982-16033 (3/24/00) and are posted on the Antitrust Division's website at http://www.usdoj.gov/atr/cases/f4100/4172.htm.

tractors (the Versatile and Genesis lines, respectively) that are used by farmers for a variety of applications, including pulling implements to till soil and cultivate crops -- part of the nation's $1.5 billion market for agricultural tractors. They also manufactured and sold a variety of hay and forage equipment, including square balers and self-propelled windrowers -- part of the $250 million U.S. market for hay tools. The Antitrust Division concluded that the transaction would significantly lessen competition and lead to higher prices and lower-quality products.

The parties agreed to significant divestitures in order to address our concerns. Those divestitures included New Holland's large two-wheel-drive agricultural tractor business, New Holland's four-wheel-drive tractor business, and Case's interest in a joint venture that makes hay and forage equipment.

4. **Monsanto/Delta & Pine Land.** About 18 months ago, Monsanto abandoned its proposed acquisition of Delta & Pine Land Co., after the Antitrust Division indicated that it was prepared to sue to prevent consummation of the transaction. The Antitrust Division concluded that the merger, which would have combined the two largest cotton seed companies, would have anticompetitively harmed farmers raising cotton.

Taken as a whole, these enforcement actions provide a good picture of our merger enforcement efforts in agriculture-related industries. The Antitrust Division carefully reviews agricultural mergers for their competitive implications, and files suit if a merger is likely to lead to anticompetitive prices either for products purchased by farmers (New Holland/Case) or for products sold by farmers (Cargill/Continental). The Division's concerns are not limited to traditional agricultural products, but extend also to biotechnology innovation (Monsanto/DeKalb and Monsanto/ Delta & Pine Land). And, while the Antitrust Division considers proposed divestitures and other forms of relief that permit a merger to proceed as restructured, the Division

is prepared to challenge a merger outright if it concludes that lesser forms of relief are not likely to address fully the competitive problems raised by the merger (Monsanto/ Delta & Pine Land).

IV. Other Potential Anticompetitive Conduct

The Antitrust Division also investigates other forms of business behavior that may have anticompetitive effects. Such conduct may constitute an illegal restraint of trade or unlawful monopolization or attempted monopolization. Of course, concentration levels are important to investigations of unlawful monopolization or attempted monopolization. In such cases, the Antitrust Division must prove that the defendant has monopoly power or a dangerous probability of obtaining such power, and market shares frequently provide a critical reference point in making such a determination. Conduct that may raise competitive issues of particular interest to farmers include strategic alliances between agribusiness companies, joint ventures among suppliers, and misuse of intellectual property rights.

The Antitrust Division is conducting a number of civil investigations in which we are considering whether conduct is having an anticompetitive impact on farmers. If we determine that such is the case, we can and will seek appropriate relief under the antitrust laws. Last September, for example, the Antitrust Division filed suit to challenge a non-compete agreement between developers of long-shelf-life tomato seeds because we concluded that the agreement was interfering with the development of new seeds for use by American farmers.

V. Coordination with USDA and Others

The Antitrust Division has a long-standing cooperative relationship with USDA, through which we have provided assistance to each other in a number of respects. Division attorneys and economists investigating particular mergers have made extensive use of the wealth of information

about agricultural markets that USDA collects in the ordinary course of its work. USDA has also contacted the Division to provide other useful information regarding major agriculture-related mergers we were investigating, and has forwarded investigative leads to the Division, such as the one resulting in the prosecution of the two cattle buyers in Nebraska for price-fixing. The Division has assisted USDA by consulting on studies USDA has conducted regarding competition-related aspects of agricultural markets, such as the red meat studies a few years ago, as well as on USDA's recent efforts to revise its investigative processes at the Grain Inspection, Packers and Stockyards Administration.

Two years ago, the Division entered into a memorandum of understanding with USDA, along with the FTC, to memorialize this working relationship and to reaffirm our commitment to work together and exchange information as appropriate on competitive developments in the agricultural marketplace.

The Antitrust Division also works with other relevant federal agencies and state attorneys general on specific matters of common interest. For example, the Division worked closely with the Commodities Futures Trading Commission and several states during the investigation of the Cargill/Continental merger.

VI. Role of Antitrust Division in the Agricultural Marketplace

The role of the Antitrust Division in the midst of the changes faced by the agricultural marketplace is narrow but important: we enforce the antitrust laws. We are not regulators. We do not have the power to restructure any industry, any market, or any company, or stop any practice, except to prevent or cure specific violations of the antitrust laws that we can prove in court. When we bring an action, the court decides whether the antitrust laws are being violated in the particular instance, and whether the remedy we are seeking fits the violation. The court's decision depends on the particular facts in evidence. Therefore, we bring an enforcement action in court only when we are in possession of factual evidence that gives us good reason to believe that there is an antitrust law violation.

The antitrust laws protect competition in the agricultural sector of our economy just as they do in other parts of the economy. These laws are based on the principle that competitive market forces should play the primary role in determining the structure of our economy. Both consumers and producers are the beneficiaries of antitrust enforcement and effective competition among producers of goods and services at all levels in the production process. Consumers benefit because that competition leads to better quality, more innovation, and lower prices. Producers who seek to supply products and services benefit because antitrust enforcement and effective competition enable them to do so free from anticompetitive interference. This is why it is often said that the antitrust laws protect competition, not competitors.

While the antitrust laws play an important role in helping keep markets competitive, they are not going to, and should not be expected to, address all of the complex issues facing American agriculture in this time of change. That is why the government continues to focus on a broad range of agriculture policy issues.

Conclusion

When we at the Antitrust Division makes a presentation such as this one about our work, we try to make clear to everybody that if they have any information that they think is relevant to our enforcement activities, we want to hear about it. As a law enforcement agency, we treat conversations with us in confidence. If the information leads us to conclude that the antitrust laws have been violated, we will take appropriate enforcement action. The Antitrust Division takes seriously its responsibility to protect the marketplace – including the agricultural marketplace – against anticompetitive conduct and against mergers that substantially lessen competition. As I hope I have made clear, the Division has a record of acting in this important sector when the antitrust laws are violated.